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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/030,966	06/20/2002	Stephen Richard Hellaby	0290-0180P	2811

2292 7590 01/05/2007
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EXAMINER

BECKER, DREW E

ART UNIT	PAPER NUMBER
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1761

SHORTENED STATUTORY PERIOD OF RESPONSE	NOTIFICATION DATE	DELIVERY MODE
3 MONTHS	01/05/2007	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

Notice of this Office communication was sent electronically on the above-indicated "Notification Date" and has a shortened statutory period for reply of 3 MONTHS from 01/05/2007.

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Office Action Summary	Application No. 10/030,966	Applicant(s) HELLABY ET AL.	
	Examiner Drew E. Becker	Art Unit 1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 10 October 2006.
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1,3,5-8,11,12,14-18,20-24,26,31,32 and 41-48 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1,3,5-8,11,12,14-18,20-24,26,31,32 and 41-48 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

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DETAILED ACTION

Claim Rejections - 35 USC § 112

1. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

2. Claims 17-18, 26, 46 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.
3. Claims 17-18 and 26 recite the limitation "the liquid carrier" or "the carrier liquid". There is insufficient antecedent basis for this limitation in the claim.
4. Claim 46 recites "a coating composition consisting essentially of flavoring or seasoning components and diluents or carriers therefor". However, none of these components are present in parent claim 1. Furthermore, parent claim 1 also included a free-flow enhancing agent and particles which are not mentioned in claim 46. It is not clear what components are encompassed by claim 46.

Claim Rejections - 35 USC § 103

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

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6. Claims 1, 3, 5, 7-8, 11-12, 15-18, 20-24, 26, 31-32, 42-44, and 46-48 are rejected under 35 U.S.C. 103(a) as being unpatentable over GB 2093679A as applied above, in view of Bourns et al [Pat. No. 5,529,800].

GB 2093679A teaches a dessert coating product comprising a suspension of particles in a carrier liquid, the food particles being in a monomodal range of 1-10 microns due to their simultaneous milling (page 1, line 122), the carrier liquid being a mixture of oils (page 1, lines 33-44), a solids content of 35-55% (page 1, line 34), flavor and seasoning components (page 2, line 25), the oil mixture being liquid at 17°C (page 1, line 77), the particles having been milled in a ball mill (page 1, lines 113), and an absence of nuts. Phrases such as "said components have been milled... using a low shear high impact milling method" are merely preferred methods of making the claimed product. GB 2093679A does not recite a free-flow enhancing agent, an adhesiveness of at least 85%, and the use of palm olein or rapeseed oil. Bourns et al teach a food product comprising a free-flow enhancing agent for granulated sugar (column 4, line 38), and the use of palm oil (column 5, line 67) and canola oil (column 6, line 1) which is a type of rapeseed oil. It would have been obvious to one of ordinary skill in the art to incorporate the oils and free-flow agent of Bourns et al into the invention of GB 2093679A since both are directed to dessert compositions, since GB 2093679A already included granulated sugar (page 2, line 24) and oils which need to liquid at room temperature (page 1, line 55), since the palm oil and canola oil of Bourns et al were liquid at room temperature (column 6, line 65), and since the free-flow agent of Bourns et al helped to keep the sugar from clumping (column 4, lines 32-39). It would have been obvious to

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one of ordinary skill in the art that the combined product of GB 2093679A, in view of Bourns et al, would have provided an adhesiveness of at least 85% since the same materials were used, since GB 2093679A simply did not recite an adhesion value, since the "collet adhesion test" of applicant (page 11, line 10) was not a regulated or uniformly applied standard in the art, and since a greater degree of adhesion would have been beneficial by more efficiently applying the composition of GB 2093679A to a food.

7. Claims 6 and 41 are rejected under 35 U.S.C. 103(a) as being unpatentable over GB 2093679A, in view of Bourns et al, as applied above, and further in view of Myers et al [Pat. No. 5,871,781].

GB 2093679A and Bourns et al teach the above mentioned components. GB 2093679A and Bourns et al do not recite calcium phosphate as the free-flow agent. Myers et al teach a food product comprising a free-flow agent in the form of calcium phosphate (column 10, line 67). It would have been obvious to one of ordinary skill in the art to incorporate the calcium phosphate of Myers et al into the invention of GB 2093679A, in view of Bourns et al, since all are directed to food products, since Bourns et al already included a free-flow agent (column 4, lines 32-39), and since calcium phosphate was a commonly used free-flow agent in foods as shown by Myers et al (column 10, lines 63-67).

8. Claims 14 and 46 are rejected under 35 U.S.C. 103(a) as being unpatentable over GB 2093679A, in view of Bourns et al, as applied above, and further in view of Smagula et al [Pat. No. 5,011,704].

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GB 2093679A and Bourns et al teach the above mentioned components. GB 2093679A and Bourns et al do not recite a viscosity of 50-100 mPa/s. Smagula et al teach a fudge sauce with a viscosity of 5000 poise or less (column 2, line 39). It would have been obvious to one of ordinary skill in the art to incorporate the viscosity value of Smagula et al in to the invention of GB 2093679A, in view of Bourns et al, since all are directed to food compositions, since GB 2093679A simply did not provide a value for the viscosity of the dessert sauce, and since fudge sauce commonly had a viscosity of 5000 poise or less (column 2, line 39) as taught by Smagula et al.

9. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Loh et al [Pat. No. 5,185,175] teach a micromilled composition.

Response to Arguments

10. Applicant's arguments filed 10/10/06 have been fully considered but they are not persuasive.

Applicant argues that GB 2093679A does not recite a monomodal composition. However, even though GB 2093679A does not specifically use the term "monomodal", it is clearly taught at page 1, line 120 where GB 2093679A described the milling taking place in one step. Applicant's own disclosure teaches that this would result in a monomodal distribution (page 5, line 26).

Applicant argues that GB 2093679A does not recite $d[0.5]$ of less than 100 micrometers, or $d[0.9]$ less than 300 micrometers. However, GB 2093679A clearly

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teaches a size of 1-10 micrometers (page 1, line 122). Clearly, this encompasses the claim limitation.

In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., a uniform particle size) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993). Applicant appears to be confusing "monomodal" with a uniform particle size (ie all particles of one particular size). However, the claims require a "mean particle size". A mean is very similar to an average in that half of the particles are larger, and half of them are smaller.

In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).


DREW BECKER
PRIMARY EXAMINER

12-13-06